No. 26-257

In the
Supreme Court of the United States

RABBI MARA NATHAN, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, M.N., ET AL.,
PETITIONERS,

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, ET AL.,
RESPONDENTS.

ROXANNE CRIBBS RINGER, ON BEHALF OF HERSELF AND ON BEHALF OF HER MINOR CHILD, E.R., ET AL.,
PETITIONERS,

v.

COMAL INDEPENDENT SCHOOL DISTRICT, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") (www.morallaw.org) is a 501(c)(3) non-profit, national public interest organization based in Alabama dedicated to the strict interpretation of the Constitution as written and intended by its Framers and the right to acknowledge God in the public arena.

The Foundation believes America was founded as a constitutional republic based upon legal and moral principles set forth in the Bible, and the Ten Commandments are therefore the moral foundation of law. The Ten Commandments set forth the basic principles of our republic, including respect for life, respect for property, respect for truth, respect for family, and respect for God as the Creator of law and government and the Grantor of unalienable rights. The Foundation believes, and will present evidence to demonstrate, that Renaissance, Reformation, and Enlightenment concepts of republican government were based not so much on Greek and Roman models but rather primarily on the model of the Hebrew Republic.

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[1] Counsel of record for all parties received timely notice, 10 days in advance, of the *Amicus's* intent to file this brief. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

From whence come the roots of the American Republic? Many look to Greece and Rome. But as John Adams wrote,

> As much as I love, esteem and admire the Greeks, I believe the Hebrews have done more to civilize the world. Moses did more than all their legislators and philosophers.[2]

Moses was a prophet, but he was much more: he was a judge, military commander, statesman, and lawgiver whose legal code has exerted great influence on the Western world. As the Foundation will demonstrate in this brief, the Ten Commandments and other portions of Biblical law became the basis for the Anglo-Saxon common law.

As the Renaissance began and the modern absolutist state emerged, Western political philosophers sought to develop, as an alternative, the ideal of a republic. They searched the ancient world for a model. The Greek democracies were unstable and short-lived, and the Roman republic degenerated into an empire. And so, as Western thinkers looked for a model of republican government, they turned to a republic more ancient than those of Greece and Rome: The Hebrew Republic.

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[2] John Adams, handwritten comments on his copy of *Outline of an Historical View of the Progress of the Human Mind;* reprinted in Zoltan Haraszti, *John Adams and the Prophets of Progress* (Harvard University Press, 1952) p. 246.

And the Hebrew Republic was different from Greek and Roman government and from other ancient societies. As Joshua Berman of Bar-Ilan University demonstrates in *Created Equal: How the Bible Broke with Ancient Political Thought* (Oxford: 2008), Hebrew thought and Hebrew law were egalitarian in the relationships of kings to commoners, of classes, and of property. Berman states:

> If there was one truth the ancients held to be self-evident it was that all men were not created equal. If we maintain today that, in fact, they are endowed by their Creator with certain inalienable rights, then it is because we have inherited as part of our cultural heritage notions of equality that were deeply entrenched in the ancient passages of the Pentateuch.[3]

The Ten Commandments therefore stand as an expression of the Hebrew political philosophy of human law based on the "laws of nature and of nature's God," of human equality based on having been created equal, of unalienable God-given rights, and of government by consent of the governed. Without denying that the Ten Commandments have religious significance, the Foundation will establish that the Decalogue stands at the very heart of our legal system, and the people of Texas's decision to place them within classrooms is firmly rooted in our Nation's history and the understanding of the Founders.

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[3] Berman 175.

ARGUMENT

> These commandments, which, like a collection of diamonds, bear testimony to their own intrinsic worth, in themselves appeal to us as coming from a superhuman or divine source, and no conscientious or reasonable man has yet been able to find a flaw in them. Absolutely flawless, negative in terms, but positive in meaning, they easily stand at the head of our whole moral system, and no nation or people can long continue a happy existence in open violation of them.
>
> *Moore v. Strickling,* 46 W. Va. 515, 33 S.E. 274, 277 (1899).

I. The Fifth Circuit correctly explained this Court's overruling of *Lemon v. Kurtzman* and *Stone v. Graham.*

Petitioners claim (Pet. 2) that the Fifth Circuit "flouted this Court's binding precedents" and "purported to unilaterally overrule this Court's decision in *Stone v. Graham,* 449 U.S. 39 (1980)." This is simply false; the Fifth Circuit did nothing of the sort. Instead, the Fifth Circuit carefully and correctly explained that this Court in its *Kennedy* decision overruled *Lemon* and, by implication, overruled *Stone v. Graham* as well. As the Fifth Circuit stated,

> *Stone* applied an analysis—the "*Lemon* test"—which confounded courts for decades. See *Lemon v. Kurtzman*, 403

> U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). Mercifully, the Supreme Court jettisoned *Lemon* and its offspring some years ago. See *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022) (recognizing the Court has "abandoned *Lemon*"). With *Lemon* extracted, there is nothing left of *Stone*. Pet.App.25a.

The Fifth Circuit then devoted no less than twelve pages (Pet.App.38a–49a) to an analysis by which they cogently demonstrated that *Lemon* had been overruled, that *Stone* was based squarely upon *Lemon,* and that the overruling of *Lemon* therefore of necessity included the overruling of *Stone.*

Stone was the nadir of the *Lemon* era. The 5-4 per curiam opinion summarily rejected the holdings of the lower courts, declared that the Ten Commandments are "plainly religious," and with the simplistic reasoning that everything must be either 100% religious or 100% secular, flatly rejected any suggestion that the Commandments could have a secular purpose. The Court stated at 42,

> If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

The assertion that there is no secular purpose in encouraging schoolchildren to "read, meditate upon, perhaps to venerate and obey" commandments to honor their parents and to refrain from committing murder, adultery, theft, lying, and coveting, is plainly ludicrous.

The Fifth Circuit did not overrule *Stone*. The Circuit simply recognized that this Court had already overruled both *Lemon* and *Stone* in *Kennedy v. Bremerton*.

II. The acknowledgement of God and His Law is not an establishment of religion.

When the First Congress adopted the First Amendment and sent it to the states for ratification, it did not intend to prohibit the public acknowledgment of God and His Law, as the evidence below demonstrates.

In 1853 and 1854, both houses of Congress undertook detailed studies of the meaning of the establishment clause of the First Amendment and came to similar conclusions. The Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy concluded:

> The clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was.

. . .

> Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; *they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators;* they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of "atheistical apathy." Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.[4]

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[4] *The Reports of Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress,* 1852-53

President George Washington, who chaired the Constitutional Convention and served as President while the Bill of Rights was being considered, declared in his October 3, 1789 National Day of Thanksgiving Proclamation, "Whereas it is *the duty of all nations to acknowledge the providence of Almighty God*, to obey His will, to be grateful for his benefits, and humbly to implore His protection and favor . . ." [emphasis added].

President Abraham Lincoln's March 30, 1863 *Proclamation Appointing a National Fast Day* was even more explicit:

> And whereas it is the *duty of nations as well as of men, to own their dependence upon the overruling power of God*, to confess their sins and transgressions, in humble sorrow, yet with assured hope that genuine repentance will lead to mercy and pardon; and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history, that those nations only are blessed whose God is the Lord . . . .

These statesmen clearly believed that the acknowledgement of God is more than the nation's right; it is the nation's duty.

(Washington, D.C.: Robert Armstrong, 1853) pp. 1-4. Senate Rep. No. 32-376 (1853) (emphasis added).

III. The Ten Commandments, and the Hebrew legal system which they represent, are the foundation of western republican models of law and government.

Those who advocate an absolute separation of church and state often see an absolute distinction between the sacred and the secular; they view everything simplistically as either 100% religious or 100% nonreligious. But as Chief Justice Rehnquist said in the plurality opinion in *Van Orden v. Perry,* 545 U.S. 677, 690 (2005), "Of course, the Ten Commandments are religious. . . . But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning." And Justice Breyer said in his concurring opinion in *Van Orden* at 701,

> In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)–a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.

The display of the Ten Commandments constitutes a recognition of the political philosophy upon which this nation was founded, as articulated in

the Declaration of Independence: that governmental authority is based upon "the laws of nature and of nature's God," that God has created all persons in a state of legal and political equality, that God has endowed all persons with "unalienable rights" that government may not abrogate, that the purpose of government is "to secure these rights," that government "derives its just powers from the consent of the governed," and whenever government becomes destructive of these ends, the people may alter or abolish it.

Robert J. Barth, Academic Dean and Professor of the Oak Brook College of Law and Government Policy, has written,

> [I]f you combine the philosophy of government of our Founders with the form of government chosen, you create a republican form of government that presupposes a Creator as the source of unalienable rights and the definer of human dignity and equality. This form of government acknowledges the existence of the Creator as a self-evident truth and yet recognizes the distinct differences between the jurisdiction of the church and the civil government. While the existence of God may be part of one's personal faith, the Founders made a distinction between acknowledging the Creator as a matter of political philosophy and the manner in which one chooses to worship or fulfill his or her duty to that God. This jurisdictional separation between the

> acknowledgement of God as an essential presupposition of good government (unalienable rights, equal protection, due process) and matters of worship, faith, and religious practices, is the essence of the legitimate separation between church and state.[5]

The Ten Commandments embody the basic source and philosophy of American government, including the following:

(1) Respect for life, as reflected in the Commandment "Thou shalt not kill" and homicide laws.

(2) Respect for property, as reflected in the Commandments "Thou shalt not steal" and "Thou shalt not covet" and property laws.

(3) Respect for family, as reflected in the Commandments "Honor thy father and thy mother" and "Thou shalt not commit adultery" and family laws.

(4) Respect for truth as reflected in the Commandments "Thou shalt not take the name of the Lord thy God in vain" and "Thou shalt not bear false witness" and perjury and fraud laws.

(5) Respect for God as reflected in the first four Commandments and the recognition of God

[5] Robert J. Barth, "Philosophy of Government vs. Religion and the First Amendment," *Oak Brook College Journal of Law and Government Policy* Vol. 5 (2006) 75-76.

as the Source of governmental authority and the Source of human rights.[6]

A Lexis search of the Ten Commandments by the author of this *amicus* brief in March 2002 revealed at least 1,106 cases of record in which the term "Ten Commandments," "Decalogue," or individual commandments by number are cited by American courts of record.[7] If the Ten Commandments are of such legal and historical significance that the courts may and do frequently cite them as legal authority in judicial opinions, they certainly are of such legal and historical significance that they may be displayed in public places.

IV. The Ten Commandments and the Hebrew Law they represent were the primary source used by early Western jurists as they developed models of republican government.

As early Western jurists developed models of republican government, they looked not primarily to Greece and Rome, but nearly a thousand years earlier to the Hebrew Republic. When Patricius (St. Patrick, AD 5th century) evangelized Ireland, he left his converts with a writing called *Liber ex Lege Moisi* (The Book of the Law of Moses). When the High King of

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[6] For a detailed analysis of the precepts of Hebrew law, see, John Eidsmoe, *Historical and Theological Foundations of Law,* 3 vols. (Nordskog Publishing 2016) 369-95.

[7] A detailed analysis of these cases may be found in Eidsmoe, *id.* 431-68; see also, Eidsmoe, "The Use of the Ten Commandments in American Courts," *Liberty University Law Review* (III:1 Spring 2009, 15-46).

Ireland ordered Patrick to lead a commission to draft the *Senchus Mor* or written legal code of Ireland, his commission employed Druid law but only to the extent it was consistent with the Old and New Testaments.[8]

When Alfred the Great drafted the Book of Dooms (AD 890), the first written legal code to govern all of England, he began it with the Ten Commandments and integrated it with Scriptural passages from the Old and New Testaments.[9]

The Rabbi Moses ben Maimon (Maimonides) (A.D. 1135 - 1204) was a towering medieval intellect who pioneered thought in Talmudic studies. His *Mishneh Torah* was the codification of Jewish law taken from the Torah, the Talmud, and the writings of early medieval Jewish scholars. Maimonides' works made the Jewish law more readily available to Western scholars, and they formed the basis for the commercial codes of much of Europe.[10]

All of this and much more led to a rebirth of Hebrew juridical studies in the 1500s. The Renaissance led to the rebirth of the modern

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[8] Seumas McManus, *The Story of the Irish Race* (Old Greenwich, CT 1921, 1990) 133ff; cf Eidsmoe, *Historical and Theological Foundations of Law,* 410, 766-73.

[9] Eidsmoe, *Historical and Theological Foundations of Law* II:825-28.

[10] Professor Michael Broyde, "The Hidden Influence of Jewish Law on the Common Law: One Lost Example," 57 Emory L.J. 1403 (2008); Richard S. Sternberg, "The Jewish Roots of English Property Law" (2018), https://sternberglaw.net/wp-content/uploads/2018/06/JewishRootsEnglishPropLaw.pdf; Rousas J. Rushdoony, *The Institutes of Biblical Law* (Presbyterian and Reformed, Craig Press, 1973) 788-89.

absolutist state. The fall of Rome led to the decline of the Roman concept of *imperium* or right to rule; medieval kings and lords ruled based upon a complex system of vassal/lord relationships that shared governmental authority with trading guilds, civic councils, cathedrals, monasteries, and other institutions. But during the Renaissance and Enlightenment, the theory began to re-emerge that the king and his government stood above all other forms of authority.[11] This fit well with the English Stuart kings' view of divine right of kings, the declaration attributed to French King Louis XIV "L'etat, c'est moi" ("I am the state"), and the absolutist ideology of Thomas Hobbes as expressed in his classic *Leviathan*.

In opposition to this rise of the absolute state, jurists in the West sought to develop a republican model of government. They looked to the Judeo-Christian tradition, the Hebrew laws, and especially the Ten Commandments. The Reformation led the way toward this republican thinking, and America's first English colonists and later the Framers were mostly children of the Reformation. Martin Luther (AD 1483 - 1546) had studied law and advocated the old Teutonic Anglo-Saxon common law that emphasized decentralized government and was based upon natural law and natural rights. Luther believed the Ten Commandments were the perfect expression of natural law:

> Natural law is the Ten Commandments. It is written in the heart of every human

[11] John B. Morrall, *Political Thought in Medieval Times* (Harper Torchbooks, 1958, 1962) 60-61.

> being by creation. It was clearly and comprehensively put on Mount Sinai, finer indeed than any philosopher has ever stated it. Natural law, then, is created and written in the heart; it does not come from men but is a created Law to which everyone who hears it cannot but consent.[12]

Carlo Sigonio (c. 1524 - 1584) was an Italian Renaissance scholar. Besides writing on Roman and Greek political systems, he wrote a treatise titled *The Hebrew Republic*[13] which enjoyed circulation and profoundly influenced later writers. A Dutch legal scholar, Petrus Cunaeus (1586-1638) is remembered for *De Republica Hebraeorum (The Hebrew Republic)*[14], described as "the most powerful statement of republican theory in the early years of the Dutch Republic."[15] In this work Cunaeus described Moses as the great lawgiver who was the "first to write and publish laws so that the people might learn what was right and what was wrong, and which sanctions might steady the state Almighty God had ordered to be set up in Palestine."[16]

Another was Johannes Althusius (c. 1557 - 1638), professor of law, theology, and philosophy

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[12] Luther, W 49, 1 f; quoted in Ewald M. Plass, *What Luther Says* 773 (Concordia 1959).

[13] Carlo Sigonio, *The Hebrew Republic* (1582, Jerusalem: Shalem Press, 2010).

[14] Petrus Cunaeus, *The Hebrew Republic* (1617, Jerusalem: Shalem Press, 2006).

[15] Richard Tuck, *Philosophy and Government, 1572-1651* (Cambridge: 1993) 169.

[16] Cunaeus 12.

whose classic *Politica*[17] was both a legal and theological justification for the Dutch secession from Spain and a grand design for federalism based on Scripture and natural law. As he wrote in the Preface to his 1614 edition,

> The precepts of the Decalogue are included to the extent that they infuse a vital spirit into the association and symbiotic life that we seek, and that they prescribe and constitute a way, rule, guiding star, and boundary for human society. If anyone would take them out of politics, he would destroy it; indeed, he would destroy all symbiosis and social life among men. For what would human life be without the piety of the first table of the Decalogue, and without the justice of the second? What would a commonwealth be without communion and communication of things useful and necessary to human life? By means of these precepts, charity becomes effective in various good works.[18]

Hugo Grotius (1583-1645) is often called the "father of international law," but along with his classic *The Rights [Law] of War and Peace*[19] he also published a first Protestant work of Christian apologetics, *The*

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[17] Johannes Althusius, *Politica* (1603, 1610, 1614, 1617, Liberty Fund 1997).

[18] Althusius, *Politica;* Preface to 1614 edition.

[19] Hugo Grotius, *The Law of War and Peace,* (1625, Liberty Fund 2005).

Truth of the Christian Religion.[20] In this latter work he argues for "the undoubted Antiquity of Moses's Writings," that "the most ancient Attick Laws, from whence the Roman were afterwards taken, owe their Origins to the Law of Moses."[21] In *War and Peace* he says the Mosaic Law can be useful in understanding natural law because

> . . . what it [the Law of Moses] enjoins is not contrary to the law of nature. For since the law of nature is perpetual and unchangeable, nothing contrary to it could be commanded by God, who is never unjust. Besides, the Law of Moses is called in the xix Psalm an undefiled and right law, and St. Paul, Romans Vii. 12, describes it to be holy, just, and good.[22]

Sir William Blackstone (1723-1780), whose *Commentaries on the Laws of England*[23] sold almost as widely in America as in England,[24] saw the English common law as ancient, rooted in the Anglo-Saxon laws and much earlier, and having "in great measure weathered the rude shock of the Norman conquest."[25]

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[20] Hugo Grotius, *The Truth of the Christian Religion* (1627, reprinted London for J.F. and C. Rivington 1777).

[21] Grotius, *The Truth* I:24-26.

[22] *War and Peace* 1:1:xvii.

[23] William Blackstone, *Commentaries on the Laws of England* (Philadelphia: Robert Bell, 1772).

[24] Edmund Burke, Speech on Conciliation with America, 1775; quoted by William D. Bader, "Some Thoughts on Blackstone, Precedent, and Originalism," 19 *Vermont Law Review* 5 (1994-1995).

[25] *Commentaries,* Introduction 1:17.

He believed that human law, to be valid, had to conform to the higher law of God, which consisted of "the revealed or divine law, and they are to be found only in the Holy Scriptures."[26] He also recognized the "law of nature, being coeval with mankind, and dictated by God himself."[27] The revealed law and the law of nature, he said, are of "equal strength and perpetuity." However,

> . . . undoubtedly the revealed law is of infinitely more authenticity than the moral system which is framed by ethical writers, and denominated the natural law; because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.[28]

Blackstone emphasized that the revealed law and the law of nature are the foundation of law: "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."[29]

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[26] *Commentaries,* Introduction 2:42.
[27] *Commentaries,* Introduction 2:41.
[28] *Commentaries* Introduction 2:42.
[29] *Commentaries* Introduction 2:42.

Harvard Professor of Government Eric Nelson details the influence of Hebrew law in *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought*.[30] Dr. Nelson surveys the Hebrew influence upon European political thought, beginning with Flavius Josephus who, he says, "first suggested to Europeans that Israelite society could be regarded as a *politeia*— a political constitution of the sort familiar to Greek philosophy—and that Moses could be understood as its lawgiver *(nomothetes)*."[31] He traces the development of European political thought based on the Hebrew model from Maimonides to the *Catalogus omnium praeceptorum legis Mosaicae (Catalogue of All of the Precepts and Laws of Moses)* (1533) through the works of Edward Lively, Henry Ainsworth, John Lightfoot, Edward Pococke, Thomas Coleman, John Spencer, John Selden, Jean Bodin, Hugo Grotius, Bonaventure Cornelius Bertram, Franciscus Junius, Wilhelm Zepper, Joachim Stephani, James Harrington, Baruch Spinoza, and Thomas Hobbes.[32] He explains that "In the middle of the seventeenth century, however, we

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[30] Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Harvard University Press 2010).

[31] Nelson 89.

[32] Because Harrington, Spinoza, and Hobbes are not regarded as Judeo-Christian thinkers, their study of the Hebrew republic is even more significant. In Harrington's *The Art of Lawgiving* (1659) he includes volume two titled *The Commonwealth of the Hebrews*. Part Three of Hobbes's *Leviathan* (1651) is titled "Of a Christian Commonwealth" and Chapter 35, "Of the Signification in Scripture of Kingdom of God," concludes that the New Testament phrase "kingdom of God" refers to the Hebrew commonwealth. Spinoza's *Tractatus Theologico-politicus* (1670) likewise discusses the *Respublica Hebraeorum* at length.

find republican authors making a new and revolutionary argument: they now begin to claim that monarchy per se is an illicit constitutional form and that all legitimate constitutions are republican."[33] He continues:

> [T]his rupture was provoked by the Protestant reception of a radical tradition of rabbinic Biblical exegesis, which understood the Israelite request for a king in I Samuel as an instance of the sin of idolatry. This embrace of "republican exclusivism" heralded the decline of constitutional pluralism and therefore marks a crucial turning point in the history of European political thought.[34]

Nelson concludes:

> For roughly 100 years—from the time of Bertram until the time of Spinoza—European Protestants made the Hebrew Bible the measure of their politics. They believed that the same God who thundered from Sinai, and who later sent his son into the world, had revealed to Israel the form of a perfect republic. They labored with the help of their rabbinic authorities to interpret his design and attempted in their own societies to replicate it as closely as possible. In the process, they made crucial contributions

[33] Nelson, 3.
[34] Nelson, 3.

> to the political thought of the modern world. Republican exclusivism, redistribution, and toleration have all been defended on different grounds in the intervening centuries; but in the beginning, all were authorized by the divine will made manifest in the constitution of the Hebrew republic.[35]

The Ten Commandments, then, stand for a view of law and government that many Americans regard as central to the American system. That is why huge majorities favor the display of the Ten Commandments.

V. The Hebrew Law symbolized by the Ten Commandments had a major formative influence on the Founders and early America.

Justice Douglas declared in *McGowan v. Maryland*, 366 U.S. 420, 562 (1961) (dissenting opinion):

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

[35] Nelson, 139.

This view of human rights did not derive from Greek philosophy or Roman jurisprudence. It comes from the laws of the ancient Hebrews. It was the political philosophy of most if not all of America's Founding Fathers, and it is the belief of a large segment of the American people today.

The early English colonists in America used the Mosaic Law as the basis for their legal codes. Possibly the first written law code in the English language in the Western Hemisphere was Jamestown's *Articles, Lawes, and Orders, Divine, Politique, and Martial for the Colony in Virginia* (1611) which contains each of the Ten Commandments except that against graven images.

The *Massachusetts Body of Liberties* (1641) was drafted by Rev. Nathaniel Ward, a clergyman who had some legal training, and served as model for legal codes throughout New England. Numerous sections were taken directly from the Mosaic Law.[36] As the Journal of John Winthrop demonstrates, when Indian nations sought to come under the protection of the Massachusetts colony, the colony did not demand that the Indians become Christians but did ask them to agree to follow the Ten Commandments, to which they assented.[37]

In *American Zion: The Old Testament as a Political Text from the Revolution to the Civil War,* Dr. Eran Shalev of the University of Haifa demonstrates that early Americans saw Israel in a special light and

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[36] *Massachusetts Body of Liberties* Article 94 Sec. 1-3.

[37] Richard S. Dunn and Laetitia Yeandle, *The Journal of John Winthrop* (Harvard University Press 1996) 232-35.

believed America to be in some way a model of Israel in its God, its morality, its laws, and even its geography. Some compared the thirteen American colonies to the twelve (or by various counts the thirteen) tribes of Israel and saw those tribes, like the American colonies, as independent states joined into a confederate republic. Puritans and other Christians strongly emphasized the Old Testament and the relevance of the Mosaic Law for today. As Shalev says, "One of [Puritanism's] lasting intellectual legacies was the central role that the Old Testament played in American public life." He concludes (189-90),

> The fingerprints of the Old Testament were—still are—particularly evident in the language of chosenness, itself, of course, a Hebrew concept. What has widely become known as the American 'mission,' the idea that the United States is endowed with an errand to promote liberty, was formed closely related to the belief that the United States was the Israel of its time.

The relevance of Hebrew law to America is further articulated in E.C. Wines's *Commentaries on the Laws of the Ancient Hebrews* (1853), a 640-page treatise that focused first on the Hebrew Republic and then the Hebrew Monarchy. Subsequent works include Edward J. White's *The Law in the Scriptures with Explanations of the Law Terms and Legal References in Both the Old and the New Testaments* which goes through the Bible book-by-book and identifies and explains legal concepts therein, J.W. Ehrlich's *The Holy Bible and the Law* which presents specific legal topics arranged in alphabetical order

(Adoption, Agriculture, Aliens, Animals, Bailments, etc.) and the Biblical bases for each of them, H.B. Clark's *Biblical Law, Being a Text of the Statutes, Ordinances, and Judgments Established in the Holy Bible—with Many Allusions to Secular Laws—Ancient, Medieval, and Modern—Documented to the Scriptures, Judicial Decisions, and Legal Literature* which divides Biblical legal concepts into general subjects (political, civil, economic, penal, and procedural), Howard B. Rand's *Digest of the Divine Law* which is a detailed explanation of the Old Testament law in theory and in practice, and R.J. Rushdoony's three-volume *Institutes of Biblical Law* which is an extended commentary on Biblical law including the Ten Commandments. Dr. Walter Harrelson's *The Ten Commandments and Human Rights* demonstrates the relevance of the Decalogue to modern issues of human rights. These and countless other works demonstrate the relevance of the Ten Commandments and Old Testament law in general throughout American history and continuing today.

VI. The District Court erred in ruling that Texas SB 10 is unconstitutional on the basis that it requires the display of the Ten Commandments but does not require the display of other documents.

The District Court held that SB 10 is unconstitutional because it singles out the Ten Commandments for display but does not require other documents like the Magna Carta or the Declaration of Independence. The reason Texas legislators singled out the Ten Commandments is obvious: There has been a concerted drive to remove the Ten Commandments from public display and public life.

There has been no similar drive to remove the Magna Carta, the Declaration of Independence or other documents. Nothing in SB 10 prohibits public schools from posting other documents as well.

VII. The requirement that schools use a particular wording of the Ten Commandments does not render SB 10 unconstitutional.

The Legislature had valid reasons for requiring this wording of the Ten Commandments. *See* Tex. Educ. Code Ann. § 1.0041(c). First, this is the most common and best-known wording of the Commandments, even by those who do not use the King James Version of the Bible.

Second, the Legislature's wording does not number the Commandments. Numbering the Commandments leads to denominational differences. Jews generally treat "I am the Lord thy God" as the First Commandment, which affects the numbering of the others. Roman Catholics and most Lutherans combine "Thou shalt have no other gods before me" and "nor worship a graven image" as the First Commandment, and then list "Thou shalt not covet thy neighbor's wife" and "Thou shalt not covet thy neighbor's goods" as the Ninth and Tenth Commandments. Most Protestants treat the "graven image" prohibition as the Second Commandment and "Thou shalt not covet" as the Tenth Commandment. By listing the commandments as stated in Exodus 20, the Legislature has avoided favoring one religion over others and has prohibited schools and school districts from favoring one religion over others.

Third, this wording was upheld by this Court in *Van Orden v. Perry,* 545 U.S. 677 (2005).

Finally, if this Court were to determine that this provision of SB 10 is unconstitutional, it should apply the principle of severability to uphold the rest of the statute. As Chief Justice Roberts wrote in *Seila Law LLC v. Consumer Financial Protection Bureau,* 591 U.S. 197 (2020), the Court has a duty to save statutes if possible, so judicial review should be "a scalpel rather than a bulldozer."

CONCLUSION

The 1956 epic film *The Ten Commandments* is so etched upon American public consciousness that Moses will always be thought to resemble Charlton Heston and Pharaoh Ramses to be like Yul Brynner. But many have forgotten that in the original uncut version, producer Cecil B. DeMille stepped out on stage and addressed the cinema audience with these words:

> Ladies and Gentlemen, young and old. This may seem an unusual procedure, but we have an unusual subject: The birth of freedom. The story of Moses. The theme of this picture is whether men ought to be ruled by God's laws or whether they are to be ruled by the whims of a dictator like Ramses. Are men the property of the State or are they

> free souls under God? This same battle continues throughout the world today.[38]

This Court recognized in *Van Orden* that the Ten Commandments have both religious and secular implications. The Ten Commandments posted in public school classrooms represent the secular implications of the Decalogue for America today. The display stands for an American philosophy of law and government: That civil governments are ordained by the "laws of nature and of nature's God," that God has created us in a state of equality and has endowed us with unalienable rights, that God has a special plan for America that includes blessing and prosperity, and that plan will be realized if we are faithful to Him and His Laws.

The people of Texas are entitled to express this philosophy of law and government in public places, including the public schools. The Ten Commandments represent the laws of the Hebrew Republic which were instrumental in the development of Western republican thought and which played a pivotal role in the settlement and development of American law and constitutional institutions. Courts have repeatedly cited the Ten Commandments as authoritative and illustrative of American legal principles.

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[38] Cecil B. DeMille, Introductory Remarks to Movie, *The Ten Commandments* (Hollywood, CA: Paramount, 1956).

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